

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:) EPA Docket No. 91-23
)
BROWN & BRYANT, INC.) ADMINISTRATIVE ORDER ON
135 Commercial Street) CONSENT PURSUANT TO SECTION
Shafter, California) 106 OF THE COMPREHENSIVE
) ENVIRONMENTAL RESPONSE,
Atchison, Topeka &) COMPENSATION, AND
Santa Fe Railway Company,) LIABILITY ACT OF 1980
) as amended, 42 U.S.C.
Respondent) Section 9606

I. PREAMBLE

The United States Environmental Protection Agency (U.S. EPA) and the Respondent Atchison, Topeka & Santa Fe Railway Company (AT&SF), have each agreed to the making and entry of this Order on Consent. It is issued pursuant to the authority vested in the President of the United States by Sections 106(a) and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Sections 9606(a) and 9622, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 (CERCLA), and delegated to the Administrator of the United States Environmental Protection Agency (U.S. EPA) by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, further delegated to the EPA Regional Administrators by U.S. EPA Delegation Nos. 14-14-A and 14-14-B, and further redelegated to the Director, Hazardous Waste Management Division by Region IX Delegations 1290.41 and 1290.42.

The State of California has been notified of the issuance of this Order as required by Section 106(a) of CERCLA, 42 U.S.C. Section 9606(a).

1 This Order requires the Respondent to undertake and complete
2 removal activities to abate conditions which may present an
3 imminent and substantial endangerment to the public health and
4 welfare or the environment because of an actual or threatened
5 release of hazardous substances at the Site.

6 **II. FINDINGS OF FACT**

7 Based on available information, including the Administrative
8 Record in this matter, U.S. EPA hereby finds:

9 **A. Physical Location and Site Description**

10 Brown & Bryant, Inc. was a pesticide formulator and custom
11 applicator located in Shafter, California, 12 miles northwest of
12 Bakersfield. The Brown & Bryant operations took place on a 13-
13 acre parcel of land at 135 Commercial Street, between the Lerdo
14 Highway and Highway 43. The adjacent area is commercial and
15 agricultural. The property is bounded by food processing and
16 packaging plants to the north; a company that formulates and
17 sells dairy feed and an empty lot to the east; an agricultural
18 crop of grapes and kiwi to the south; and the AT&SF Railroad
19 tracks to the west.

20 Shafter is an agricultural community of approximately 10,000
21 people. Residential areas are located to the north and west and
22 within 1/4 mile of the property. A public park, Hudson Park, is
23 also located to the west and within 1/4 mile of the property.
24 Richland Elementary School, Shafter High School, Kern Crest Manor
25 Retirement Home and Shafter Convalescent Hospital are located
26 within 3/4 miles of the property. For purposes of this Order,
27 "the Site" and "on-site" shall refer to the areal extent of the
28 contamination, including but not limited to the facility and the

1 contaminated portion of the adjoining Atchison, Topeka & Santa Fe
2 Railway right-of-way. These terms have these meanings only for
3 purposes of this Order and are not intended to constitute a
4 determination as to what locations are and are not "on-site" for
5 any other purpose.

6 B. Enforcement Background

7 Brown & Bryant, Shafter formulated and repackaged
8 agricultural chemicals, including insecticides, herbicides,
9 fumigants and fertilizers, from 1950 to 1989. Prior to 1950, the
10 property was farmland.

11 Brown & Bryant, Inc. (B&B) notified the EPA in July, 1980,
12 that its Shafter operation treated, stored and/or disposed of
13 hazardous wastes. A Part A application as required under the
14 Resource Conservation and Recovery Act (RCRA) was submitted in
15 November, 1980, indicating that Brown & Bryant, Shafter was a
16 storage facility. In 1983, Brown & Bryant submitted a revised
17 Part A indicating that it was a disposal facility. California
18 Department of Health Services (DHS) issued an Interim Status
19 Document for Brown & Bryant, Shafter in December, 1981 and
20 inspected it in May, 1983. DHS documented 34 violations, in-
21 cluding improper and negligent handling, storage, and disposal of
22 hazardous materials and wastes. Following the inspection, DHS
23 directed B&B to correct the violations and to conduct a remedial
24 investigation. Between 1984 and 1988, B&B conducted several
25 remedial investigations and cleanup actions under the supervision
26 of DHS.

27 DHS found that the Closure Plan submitted in November, 1987,
28 was inadequate. In a revised Closure Plan submitted in April,

1 1988, B&B proposed to clean up the hazardous waste units that
2 were described as five surface impoundments, several surface
3 drains and drain lines, can and drum storage area, a wash pad
4 area, the contained rinse system, and a rainwater treatment
5 system. In addition, the closure plan required B&B to implement
6 a RCRA groundwater monitoring program using its existing
7 groundwater monitoring wells.

8 The Closure Plan had been reviewed by the EPA, DHS, and the
9 Central Valley Regional Water Quality Control Board (RWQCB).
10 With several modifications, the plan was approved on November 25,
11 1988. The closure was to be conducted as part of the ongoing
12 remedial action required by DHS. In 1989, B&B became insolvent
13 and went out of business. The approved Closure Plan was never
14 implemented.

15 In August, 1989, DHS requested that EPA complete a Listing
16 Site Inspection (LSI) so that the Site could be evaluated for
17 possible inclusion on the National Priorities List (NPL). The
18 LSI work was performed jointly by EPA and DHS. During April,
19 1991, DHS funded the installation of four monitoring wells.
20 EPA's Field Investigation Team (FIT) contractor provided
21 oversight and technical assistance. Sampling of the wells was
22 conducted by FIT in May, 1991. The Listing Site Inspection
23 Summary Report was issued in October, 1991.

24 On May 10, 1991, representatives from DHS and FIT observed a
25 pool of water approximately one foot deep and twelve feet in
26 diameter, with a very visible bright yellow coloration that was
27 indicative of the presence of dinoseb. The standing water was
28 within the Atchison, Topeka & Santa Fe Railway right-of-way where

1 public access was not restricted.

2 On May 21, 1991, the Site was referred to EPA's Emergency
3 Response Section (ERS). EPA ERS began conducting a preliminary
4 assessment (PA) to determine if there was a threat to public
5 health or the environment. The field component of the PA was
6 conducted on July 8 through 10, by the EPA On Scene Coordinator
7 (OSC) and the Technical Assistance Team contractor (TAT). The
8 analysis of samples taken indicated that a wide variety of
9 pesticides were dispersed in surface soils, and high
10 concentrations or "hot spots" were associated with pesticide
11 storage, process, and transfer areas. Additional problems that
12 were observed included an area affected by a large acid spill,
13 improper storage of hazardous substances and banned pesticide
14 product containers, and inadequate Site security.

15 C. Respondent

16 The Atchison, Topeka & Santa Fe Railway Company (AT&SF) owns
17 the western portion of the Site where most of the Brown & Bryant
18 plant operations occurred, and leased this property to Brown &
19 Bryant during the time of such operations. AT&SF also owns the
20 right-of-way which lies immediately to the west of the Brown &
21 Bryant area of operations.

22 D. Site Characteristics and History of Operations

23 Brown & Bryant, Shafter is an abandoned pesticide
24 formulator. Consistent with previous remedial investigations,
25 portions of the Site have been identified as sections 1 through
26 5. Another area (section 6), the AT&SF right-of-way, has been
27 added to cover an area of contamination outside of the Brown &
28 Bryant operations fenceline. The approximate boundaries of these

1 sections are shown on the attached map, Appendix A.

2 1. Section 1: Maintenance Shop/Wash Pad Areas

3 The northwest section of the Site includes the maintenance
4 shops, wash pad, gas pumping station equipped with an underground
5 2,000 gallon steel gasoline storage tank, and parking area for
6 equipment and small mobile tanks. The concrete wash pad and two
7 floor sumps were built in 1958 at the west end of the maintenance
8 shops. Equipment, including tanks, were rinsed in the wash racks
9 and rinsate was collected in the sand traps where soil particles
10 were filtered out of the rinsate. The filtered overflow was
11 allowed to drain into a sewer line. The wash pad was also used
12 for steam cleaning engines and other vehicle parts, and for
13 stripping paint off the exterior of small tanks. Inorganic
14 acids, dispensed from a covered metal acid tank, were used in the
15 paint stripping process.

16 The area north of the maintenance shops was used for parking
17 and storage of equipment and small mobile tanks which were used
18 to deliver pesticides to B&B's customers.

19 Also located in the northwest section are several buildings
20 including the dry fertilizer warehouse, bulk fertilizer storage
21 silo, fertilizer packaging shed, and a weigh scale.

22 2. Section 2: Tank and Process Areas

23 The southwest section of the Site was used for bulk storage
24 and processing operations. A small pesticide warehouse building
25 is located 50 feet east of the process area and the area
26 southeast of this warehouse was used for storage of used drums of
27 pesticides from 1959 to 1978.

28 Pesticide products received in prepackaged quantities were

1 mixed and repackaged in the process area and, in 1959, prepara-
2 tions of mixtures of DDT, malathion, and toxaphene began in the
3 process area. During the early 1960s, Brown & Bryant, Shafter
4 began preparing mixtures of aldrin, dieldrin, endrin, tedion,
5 parathion, and ethion. A xylene solvent and emulsifier (Emgard)
6 were used in these mixtures. Brown & Bryant, Shafter also began
7 selling the fumigants 1,3-dichloropropene (DD, Telone) and
8 dibromochloropropane (DBCP). DBCP was received and stored in
9 prepackaged quantities and the DD, Telone, xylene solvents,
10 Emgard, and diesel fuel, were stored in large storage tanks
11 and/or mixed in bulk quantities. In 1969, preparation of bulk
12 quantities of BB Weedkiller D began in the process area. BB
13 Weedkiller D was a mixture of dinoseb (2-sec- butyl-4,6-
14 dinitrophenol), Emgard, and diesel fuel. By 1978, preparation of
15 mixtures at Brown & Bryant, Shafter was limited to fertilizers,
16 malathion, and dinoseb. In 1980, DBCP was replaced by bulk
17 quantities of ethylene dibromide (EDB) which were stored in a
18 large storage tank. The preparation of dinoseb and the use of
19 EDB were discontinued in 1983. Full dinoseb product containers
20 were found in the process area.

21 In 1976, the City of Shafter Well No. 10 was constructed at
22 a location immediately south, and adjacent to, section 2. The
23 underground water main from this well was placed under a former
24 roadway that was, at the time, outside the east property
25 fenceline. In 1977, Brown & Bryant's operations expanded towards
26 the east to permit the construction of pond no. 1 (section 3) and
27 fumigant storage tanks (section 2). As a result of this
28 expansion, the water main transversed tank storage and processing

1 areas in section 2. On June 10, 1991, the City of Shafter had to
2 access the property to repair a broken section of water main
3 located between the fertilizer and fumigant storage tanks,
4 approximately 100 feet north of the Shafter Well No. 10.

5 The tanks immediately south of the process area were used
6 for insecticides, herbicides and some fertilizers. The storage
7 area consisted of 10 tanks (tank nos. 14-23) which were primarily
8 10,000 gallon tanks that held various products depending on which
9 ones were in use at the time. These tanks were used for the
10 storage of toxaphene, dinoseb, DD, petroleum oils (Volck Supreme
11 Oil), xylene, Emgard, ammonium thiosulfate (Thio-Sul), fertilizer
12 UN-32, and zinc chelate.

13 The group of tanks located directly east of the pesticide
14 tank group was primarily used for the storage, mixing, and dis-
15 pensing of bulk liquid fertilizers. The storage area consisted
16 of 13 tanks (tank nos. 1-13) which were 20,000-gallon tanks, ex-
17 cept for tank no. 1 which was a 150,000-gallon tank. These tanks
18 contained aqueous ammonia, phosphoric acid, ammonia phosphate,
19 fertilizer UN-32, zinc sulfate, and Telone (a fumigant).

20 In 1980, a concrete secondary containment structure was
21 built directly east of the fertilizer tank group to contain 5
22 tanks (tank nos. 27-31). This tank group included tanks ranging
23 in capacity from 5,000-gallons to 10,000-gallons, which were
24 primarily used for the storage of the fumigants, Telone, DD and
25 EDB, and diesel fuel.

26 In addition, a 250,000-gallon and 150,000-gallon capacity
27 tank (tank nos. 23 and 24) were used to store the fertilizer UN-
28 32. These tanks were later used to provide additional storage

1 capacity for collected surface run-off.

2 In 1987, DHS required B&B to construct a rainwater treatment
3 system to treat contaminated surface run-off. The treatment sys-
4 tem consisted of a 3,000-gallon cone tank, a 2,400-gallon balanc-
5 ing tank, cartridge filter units, two activated carbon filters of
6 110 gallon capacity, and three 21,000-gallon Baker tanks for
7 storage of treated water. Six surface drainage collection points
8 were fitted with sump pumps that directed all storm water run-off
9 to tank no. 23. For additional storage capacity, underground
10 pipelines connected tank no. 23 to tank no. 24. Tank no. 23 is
11 connected to the City sewer system. Treatment of storm water
12 run-off was terminated in 1989 after Brown & Bryant allowed the
13 permit to expire. There was an estimated 250,000 gallons of un-
14 treated run-off water in the tanks. Samples from tank no. 23 had
15 been analyzed for pesticides by both State and local agencies.
16 Dinoseb was detected in the City's samples at 1.6 ppb. Dinoseb
17 was detected in the DHS samples, but was below lab detection
18 limits.

19 3. Section 3: Pond No. 1 Area

20 Section 3 consists of pond no. 1, a concrete wash pad with
21 two sand traps, and a concrete collection pit. Pond no. 1 was
22 constructed in 1978 to collect storm water run-off from surface
23 drains and direct overland flow. The pond was approximately 12
24 feet deep, 20 feet wide and 200 feet long and was not lined. The
25 maximum volume of water held in this pond was approximately
26 150,000 gallons. A concrete wash pad was installed on the south
27 side of the pond which was used to wash vehicles and trailers and
28 filtered rinsate was discharged to the pond. In 1980 the pond

1 was retrofitted with a double-liner, leak detection system. In
2 1982, a concrete collection pit was installed on the western edge
3 of the pond to collect storm water run-off from the surface
4 drains and redirect the flow to pond no. 2. Several or-
5 ganochlorine and carbamate pesticides, chlorinated herbicides,
6 and volatile organics have been detected in soil borings below
7 the pond.

8 4. Section 4: Contained Rinse System/Can Enclosure
9 Areas

10 Section 4 consists of the contained rinse system for fer-
11 tilizer and pesticide wastestreams and the can enclosure area.
12 The southern side was used for rinsing equipment used to store,
13 transport, or apply pesticides. The northern portion of section
14 4 was used for rinsing fertilizer equipment.

15 The structure was built in 1983, and consisted of two
16 separate concrete pads with berms and sumps that collected the
17 rinsate. Sump pumps were used to transfer the pesticide rinsate
18 to a 5,000-gallon tank and fertilizer rinsate to a 2,500-gallon
19 tank inside the containment. In the summer of 1987, the pes-
20 ticide pad, sump and tank were cleaned by Kern Environmental
21 Services for Brown & Bryant. A 2,700-gallon mobile tank
22 containing hazardous substances was later moved into the
23 pesticide containment.

24 The can enclosure is located immediately adjacent to, and
25 south of, the contained rinse system. The enclosure was con-
26 structed in 1978 and consisted of a 20-foot by 30-foot concrete
27 slab with berms and a six-foot tall wooden fence surrounding the
28 enclosure. The enclosure was used for the storage of empty pes-

1 ticide containers returned by customers. Drainage from this
2 enclosure was directed to the sump in the pesticide rinse system.
3 The enclosure was later used for storage of drums containing haz-
4 ardous substances and contaminated soil cuttings.

5 5. Section 5: Ponds Nos. 2-5

6 Ponds nos. 2 through 5 were constructed in 1982 to increase
7 the storage volume and evaporative area for the collection of.
8 storm water run-off. Pond nos. 2 and 3 were lined with PVC and
9 polyethylene liners. A two-inch diameter pipeline from a collec-
10 tion pit in pond no. 1 delivered collected rain water run-off to
11 pond no. 2. Ponds nos. 2 through 5 were interconnected by a
12 series of pipelines. Volatile organic compounds, organochlorine
13 and carbamate pesticides have been detected in soil borings.

14 6. Section 6: AT&SF Right-Of-Way

15 The Atchison, Topeka & Santa Fe Railroad owns a series of
16 tracks adjacent to Brown & Bryant, Shafter. Bulk chemicals were
17 off-loaded from tank cars to storage tanks at several tank car
18 unloading racks within a portion of the AT&SF right-of-way
19 extending from the fenceline to the first set of tracks. The
20 dimensions of this area are approximately 800 feet long and 25
21 feet wide.

22 An underground, three-inch diameter fiberglass pipeline con-
23 nected tank no. 11 to two unloading racks directly south of tank
24 no. 11. Several underground pipelines connected tank nos. 2
25 through 10 to the unloading rack located near the fertilizer
26 building. Bulk loads of aqueous ammonia and phosphoric acid were
27 delivered in tank car.

28 On May 10, 1991, representatives from DHS and FIT observed

1 ponding water within the right-of-way after a rare storm event.
2 The standing water was a bright yellow color indicative of
3 dinoseb contamination. Previous sampling in this area had
4 detected dinoseb, DDT and toxaphene in near-surface soils. Since
5 there was a high potential for public exposure to the con-
6 taminants, EPA contacted AT&SF to discuss the situation. AT&SF
7 agreed to restrict public access to the area and, on June 13,
8 1991, AT&SF constructed 825 linear feet of fencing to enclose the
9 estimated area of contamination outside the area of Brown &
10 Bryant operations.

11 E. Incident/Release Characteristics

12 The May, 1991, preliminary assessment focused on obtaining
13 an inventory of abandoned drums, containers and tanks and iden-
14 tification of their contents, and soils data to determine the
15 location and extent of soil contamination "hot-spots".

16 Appendix B to this Order is a list of the chemicals and
17 their constituents present on the property, drum inventories, and
18 tank inventories.

19 1. Hazardous Substances in Drums and Containers

20 A total of eighty-one dinoseb product containers were aban-
21 doned in the process area (section 2). During the PA, twenty 30-
22 gallon drums and sixty-one 5-gallon containers of the banned
23 pesticide, dinoseb, were inventoried. The total volume is 905
24 gallons. The containers are very old and deteriorated, and at
25 least one drum has leakage on the exterior. There are also three
26 5-gallon fiber containers in poor condition containing vat
27 stripper, a strong alkaline corrosive material. The process area
28 is open, except for a roof, and is not sufficient to protect the

1 containers from exposure to the weather. In addition, the cement
2 floor is stained yellow in several areas which indicates that
3 dinoseb has spilled in the process area.

4 In the can enclosure area (section 4) there are forty-eight
5 55-gallon drums. At least thirty-four drums contain hazardous
6 substances. Sixteen of these drums contain liquids, and the
7 analysis of a sample taken from one drum indicated that the
8 contents are contaminated with 4,4-DDE. Eighteen of these drums
9 contained solids and the analysis of a sample taken from one drum
10 indicated the presence of chlorotoluene, a volatile organic.
11 Eight drums may contain contaminated soil cuttings and six drums
12 may contain well purge water. All drums are completely exposed
13 and most are extremely corroded.

14 There are also two drums located in the rainwater treatment
15 area (section 2) that appear to contain spent filters and
16 possibly sludge from the cone filter. The surface drainage
17 collection sumps were filled with liquids and a sample taken from
18 sump no. 2 in the southwest corner of the Site indicated the
19 presence of Dinoseb.

20 2. Hazardous Substances in Tanks

21 The interiors of the insecticide/herbicide, fertilizer and
22 fumigant storage tanks were not inspected and it is unknown
23 whether any of the tanks were fully emptied and/or
24 decontaminated. Dinoseb was stored in tank number 20. Several
25 tanks have been removed intact and are no longer on-site. Other
26 tanks have been cut-off near the bottom and gravel filled.

27 The 2,700-gallon mobile tank in the contained rinse system
28 area (section 4) contains an estimated 1,000 gallons of aqueous

1 waste. Laboratory analysis indicates that the contents are con-
2 taminated with 4,4-DDE. This is a very old tank and its
3 integrity is questionable. The pesticide rinsate tank contains a
4 few inches of residue while the fertilizer rinsate tank contains
5 approximately two feet of dried sludge at the bottom.

6 There are an estimated 250,000 gallons of potentially con-
7 taminated or untreated surface run-off water in two large storage
8 tanks and 5,000 gallons in two treatment tanks.

9 3. Soil and Groundwater Contamination

10 The soil sampling focused on assessing the magnitude of the
11 contamination in targeted surface soil "hotspots" and preliminary
12 results were found to be consistent with the soils data obtained
13 from previous remedial investigations.

14 Surface soil contamination "hotspots" were located in the
15 vicinity of the tank and process areas (section 2) and in the ad-
16 jacent area within the railroad right-of-way (section 6). These
17 areas were used for the transfer, repackaging, formulation, and
18 storage of pesticides and fertilizers. Soil contamination was
19 also conspicuous in the maintenance shop area (section 1) where
20 mobile tanks and other equipment were parked or washed out and
21 repaired. The principal soil contaminants were toxaphene,
22 dinoseb, DDT, and its breakdown product, DDE.

23 The most contaminated areas were in the vicinity of the
24 insecticide/herbicide tank group where heavy staining, soil dis-
25 coloration and product spillage was evident. It appeared that
26 product spillage had spread under some of the tanks and the
27 fenceline adjacent to the railroad right-of-way.

28 In addition to pesticide contamination, there was evidence

1 of a large acid spill in the area of the water main break
2 (section 2). City workers had reported that a thirty-foot sec-
3 tion of twelve-inch diameter asbestos water pipe had been
4 destroyed by chemical corrosion. During the PA, samples from
5 this area were field tested for corrosivity. A sample was
6 submitted for laboratory analysis. The soil sample had a field
7 pH of 0 and a lab pH of 1.7. Asbestos fibers are known to
8 deteriorate rapidly in strong acids.

9 In the vicinity of the Site, the groundwater occurs in two
10 water-bearing zones. The first zone is referred to as the
11 regional unconfined aquifer and is at an approximate depth of 210
12 to 245 feet below ground surface (bgs). Pesticide contamination
13 (EDB and DBCP) was detected in this zone in early 1988 in on-site
14 monitoring wells and DBCP levels ranged from less than 0.02 ppb
15 to 0.4 ppb which exceeded the current EPA Maximum Contaminant
16 Level (MCL) for DBCP of 0.2 ppb in drinking water. Recent
17 sampling completed by the EPA FIT contractor indicated that DBCP
18 was present in the groundwater under the Site at levels ranging
19 from 0.09 ppb to 0.2 ppb, the highest concentrations being
20 detected in the upgradient monitoring well. Based upon these
21 results, the contamination cannot be attributed to the site at
22 this time; however, further testing will be conducted to
23 determine whether the presence of DBCP in the groundwater is
24 attributable to a release from the Site or is a result of
25 regional contamination.

26 Below the first water-bearing zone is the Corcoran clay
27 layer or aquitard which separates the regional unconfined from
28 the regional confined aquifer, the second zone. The regional

1 confined aquifer between 400 and 500 feet bgs provides drinking
2 water for Shafter. Shafter Municipal Well #10 was constructed in
3 1976 to a depth of 700 feet. The well has a concrete seal from 0
4 to 200 feet bgs, is gravel packed from 200 feet to 500 feet bgs,
5 and is screened from 500 to 700 feet bgs. The Public Works
6 Department samples the well quarterly for DBCP and EDB and, to
7 date, no contamination has been detected. A pump test performed
8 in 1988 by a contractor for Brown & Bryant, determined that there
9 was a hydraulic relationship occurring between municipal well #10
10 and the upper regional aquifer.

11 Subsurface contamination has been reported to a depth of
12 55.5 feet bgs by DHS and FIT during the drilling program con-
13 ducted in 1990. The Field Analytical Support Program (FASP)
14 mobile lab was used to analyze borehole soil samples. DBCP was
15 reported as greater than 716 ug/kg at 55.5 feet bgs and 1,2-
16 dichloropropane (1,2-DCP) was reported as greater than 523 ug/kg
17 at 55.5 feet bgs at one borehole location. These results
18 represented the bottom of the borehole.

19 F. Threats to Public Health or Welfare or/and the
20 Environment

21 Three of the chemicals located on the Site, toxaphene,
22 dinoseb, and DDT were suspended and canceled by EPA prior to 1987
23 because of hazards to human health and the environment, and
24 existing stocks in commerce were banned from use.

25 Toxaphene, DDT, and its metabolite, DDE are highly
26 persistent in the environment. Toxaphene is highly toxic by
27 ingestion and is moderately toxic by inhalation and skin
28 absorption. Chronic exposure to toxaphene has been shown to

1 damage the liver, kidneys and stimulate the central nervous
2 system in animals. Toxaphene is a suspected human carcinogen
3 with an increase in the incidence of hepatocellular carcinoma and
4 thyroid tumors being observed in mice and rats respectively after
5 chronic oral administration.

6 DDT is toxic by dermal absorption and ingestion. Chronic
7 exposure to DDT can damage the central nervous system and liver.
8 DDT is a suspected human carcinogen. In addition, DDT is a
9 reproductive toxin and is responsible for the decreased reproduc-
10 tive success of many bird species. In humans, DDT may cross the
11 placenta and may be excreted in human milk. Organic solvents may
12 decrease the convulsive effects of DDT and increase the toxicity.
13 Both toxaphene and DDT can biomagnify increasing the toxicity to
14 animals further up the foodchain.

15 Dinoseb, a dinitrophenol herbicide, is highly toxic by der-
16 mal absorption and ingestion. Following the absorption of
17 dinoseb, symptoms may occur suddenly, and for up to two days
18 after the cessation of exposure. EPA has determined that an ade-
19 quate margin of safety does not exist between the use of dinoseb
20 and the potential effects of this chemical in inducing birth
21 defects or producing sterility in man. Studies in laboratory
22 animals suggest that dinoseb has the potential to affect the im-
23 munological system. Hot environments may enhance the absorption
24 and the toxic effects.

25 Also present at the Site is 1,2-Dibromo-3-chloropropane
26 (DBCP) which is highly toxic by inhalation, toxic by ingestion,
27 and moderately toxic by dermal absorption. DBCP is an OSHA car-
28 cinogen, and a suspected human carcinogen. Chronic exposure to

1 DBCP can act as a central nervous system depressant, and may
2 affect the lungs, liver, and kidneys. This chemical can induce
3 sterility.

4 These pesticides pose an immediate threat to public health
5 and the environment due to the potential for exposure from direct
6 contact with contaminated surface soils, hazardous substances and
7 banned pesticide products. Hazardous levels of pesticides have
8 been found in the surface soils on-Site. The Site is in close
9 proximity to residential areas. Children, railroad workers and
10 City and County employees have been observed in or near the
11 contamination "hotspots." AT&SF maintains several tracks and
12 freight cars on the west side. City employees perform routine
13 maintenance work on the City well. Present Site security
14 measures are inadequate to prevent public access to contaminated
15 areas.

16 Presently, the storm water runoff collection system is not
17 being operated or maintained. There is a potential for on-site
18 flooding and contaminated runoff onto adjacent properties. In
19 addition, it is unknown whether the city sewer system under the
20 Site has been properly plugged or abandoned. There is a
21 potential for contaminants to seep into the old sewer lines and
22 contaminate surface waters.

23 In a health consultation with the Agency for Toxic Sub-
24 stances and Disease Registry (ATSDR) on August 26, 1991, EPA was
25 advised that potential exposures to existing levels of pesticide
26 contaminants in soils, wastes and product materials posed a
27 threat to human health. ATSDR expressed concern about the
28 proximity of the municipal well and the potential threat to the

1 drinking water supply. The potential for airborne contamination
2 exposure is also a concern due to the proximity of residential
3 areas.

4 III. CONCLUSIONS OF LAW

5 A. The Brown & Bryant, Inc. Site, located at 135
6 Commercial Street, Shafter, California is a "facility" as defined
7 by Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9).

8 B. Respondent is a "person" as defined by Section 101(21)
9 of CERCLA, 42 U.S.C. Section 9601(21).

10 C. Respondent Atchison Topeka & Santa Fe Railroad is a
11 present "owner" of the Site, as defined by Section 101(20) of
12 CERCLA, 42 U.S.C. Section 9601(20). Respondent was an owner or
13 operator of the Site at the time of disposal, or arranged for
14 disposal or transport for disposal of hazardous substances at the
15 Brown & Bryant, Inc., Shafter Site. Respondent is therefore a
16 liable person under Section 107(a) of CERCLA, 42 U.S.C. Section
17 9607.

18 D. Chemicals and their constituents which are present at
19 the Site, including but not limited to Toxaphene, DDT, DDE, DBCP,
20 and Dinoseb, are "hazardous substances" as defined by Section
21 101(14) of CERCLA, 42 U.S.C. Section 9601(14).

22 E. The presence of hazardous substances in soil, in
23 leaking and deteriorated barrels and tanks, and in surface
24 impoundments at the Site and the potential for those substances
25 to migrate constitute an actual or threatened "release" as that
26 term is defined in Section 101(22) of CERCLA, 42 U.S.C. Section
27 9601(22).
28

1 **IV. DETERMINATIONS**

2 Based on the foregoing Findings of Fact and Conclusions of
3 Law, the Director, Hazardous Waste Management Division, EPA
4 Region IX, has determined that:

5 A. The actual or threatened release of hazardous
6 substances at or from the Facility may present an imminent and
7 substantial endangerment to the public health, welfare, or the
8 environment.

9 B. In order to prevent or mitigate immediate and
10 significant risk of harm to human health and the environment, it
11 is necessary that actions be taken immediately to contain and
12 prevent the release and potential release of hazardous
13 substances, pollutants, or contaminants from the Site.

14 C. The actions required by this Order, if properly
15 performed, are consistent with the National Contingency Plan
16 (NCP), 40 CFR Part 300, as amended, and CERCLA, and are
17 reasonable and necessary to protect the public health, welfare
18 and the environment.

19 **V. WORK TO BE PERFORMED**

20 A. Based upon the foregoing Findings, Conclusions, and
21 Determinations, and pursuant to Section 106(a) of CERCLA, 42
22 U.S.C. Section 9606(a), it is hereby ordered and agreed that
23 Respondent will undertake the following actions under the
24 direction of EPA's On-Scene Coordinator:

25 1. Beginning on the effective date of this Order, the
26 Respondent shall provide twenty-four hour security at the Site by
27 maintaining a perimeter fence in good condition with locked
28 gates.

1 2. Within five (5) calendar days of the effective
2 date of this Order, the Respondent shall restrict access to the
3 Site and shall replace all existing locks at entrances to the
4 Site, will provide keys for all new locks to the U.S. EPA and
5 California Department of Toxic Substances Control, and will
6 notify pertinent local government agencies of the changes to Site
7 access.

8 3. Within fifteen (15) calendar days after the
9 effective date of this Order, the Respondent shall submit to U.S.
10 EPA for approval, a Work Plan for the removal activities ordered
11 as set forth in Paragraph 5 below. The Work Plan shall provide a
12 concise description of the activities to be conducted to comply
13 with the requirements of this Order, and shall include a proposed
14 schedule for implementing and completing the activities. The
15 Work Plan shall be reviewed by U.S. EPA, which may approve,
16 disapprove, require revisions, or modify the Work Plan.
17 Respondent shall implement the Work Plan as finally approved by
18 U.S. EPA. Once approved, the Work Plan shall be deemed to be
19 incorporated into and made a fully enforceable part of this
20 Order. The Work Plan shall contain a Site safety and health
21 plan, a sampling and analysis plan, a dust suppression control
22 plan, and a schedule providing interim timeframes, including
23 initiation and completion dates, for the work to be performed,
24 and a final completion date for the response actions to threats
25 posed by the Site. The Site safety and health plan shall be
26 prepared in accordance with EPA's Standard Operating Safety
27 Guide, dated November 1981 and updated July 1988, and with the
28 Occupational Safety and Health Administration (OSHA) regulations

1 applicable to Hazardous Waste Operations and Emergency Response,
2 29 CFR Part 1910.120. The Work Plan and other submitted
3 documents shall demonstrate that the Respondent can properly
4 conduct the actions required by this Order.

5 4. Respondent shall retain an environmental
6 consultant qualified to undertake and complete the requirements
7 of this Order, and shall notify U.S. EPA of the name of such
8 consultant within ten (10) days of the effective date of this
9 Order. Respondent will further provide a list of qualified
10 contractors that may be used to perform the field activities
11 specified in this Order. Upon being notified of the identity of
12 the Respondent's selected consultant and contractors, U.S. EPA
13 may disapprove of any, or all, of the consultants, contractors
14 and/or subcontractors retained by the Respondent. In the event
15 U.S. EPA disapproves of a selected contractor, Respondent shall
16 retain a different contractor to perform the work, and such
17 selection shall be made within two (2) business days following
18 U.S. EPA's disapproval. In the event U.S. EPA disapproves of the
19 selected consultant, Respondent shall retain a different
20 environmental consultant within ten (10) business days following
21 U.S. EPA's disapproval.

22 5. Respondent shall implement and complete the Work
23 Plan as approved or modified by U.S. EPA in accordance with the
24 approved schedule. Failure of the Respondent to properly perform
25 any aspect of the Work Plan in accordance with the time schedules
26 set forth herein, shall be deemed to be a violation of the terms
27 of this Order. The Work Plan shall include provisions for the
28 following activities to be completed within the timeframes set

1 forth:

2 a. Within ten (10) calendar days after U.S. EPA
3 approval of the Work Plan, the Respondent
4 shall perform, and complete, at a minimum,
5 the following removal actions:

6 (1) Repair the fence surrounding the Site to
7 prevent public access by people or stray
8 animals, and extend the fence to prevent
9 access to the area of surface soil
10 contamination previously identified by
11 U.S. EPA which is located immediately
12 west of the City of Shafter Municipal
13 Well #10 Enclosure.

14 (2) Implement a program to suppress dust
15 emissions in areas where U.S. EPA has
16 identified surface soil contamination.

17 b. Within thirty (30) calendar days after U.S.
18 EPA approval of the Work Plan the Respondent
19 shall perform, and complete, at a minimum,
20 the following removal activities:

21 (1) Sample and characterize the hazardous
22 substances present in drums, tanks,
23 product pipelines, and sumps.

24 (2) Further characterize, as needed to
25 accomplish the work outlined in the
26 Order, the extent of contamination in
27 the areas of surface soil with high
28 levels of contamination and the acid

1 spill area, both as previously
2 identified by U.S. EPA and as specified
3 in this Order.

4 (3) Stabilize and prepare for disposal drums
5 and containers containing Dinoseb
6 product material.

7 (4) Stabilize and prepare for disposal drums
8 and containers containing any other
9 hazardous substances.

10 (5) Containerize and prepare for disposal
11 the hazardous substances in the mobile
12 tank located in the empty can enclosure
13 area.

14 c. Within sixty (60) calendar days after U.S.
15 EPA approval of the Work Plan the Respondent
16 shall perform, and complete, the following
17 removal activities:

18 (1) Transport and dispose of all drums and
19 containers containing Dinoseb product
20 material and other hazardous substances.

21 (2) Transport and dispose of hazardous
22 substances formerly contained in the
23 mobile tank located in the empty drum
24 enclosure area.

25 (3) Prepare and submit a task-specific work
26 plan, including the results of the
27 characterization study and an
28 implementation schedule, for the

1 treatment and disposal of hazardous
2 substances in stationary tanks, and the
3 decontamination and disposition of the
4 mobile and stationary tanks.

- 5 (4) Prepare and submit a task-specific work
6 plan, including the results of the
7 characterization study and an
8 implementation schedule, for the
9 removal, treatment, or disposal of
10 hazardous wastes or residues remaining
11 in process pipelines, surface drains
12 excluding storm water collection drains,
13 process area sumps, and underlying soils
14 grossly contaminated from any leaks
15 (unless U.S. EPA approves an alternative
16 containment or mitigation measure) and
17 disconnection or plugging of any
18 connections between piping leaving the
19 Site and entering the sewers.

- 20 (5) Prepare and submit a task-specific work
21 plan, including the results of the
22 characterization study and an
23 implementation schedule, for the
24 removal, treatment, or disposal (or
25 other mitigation or containment, if
26 approved by U.S. EPA) of all areas of
27 surface soil with high levels of
28 pesticide contamination present at and

1 near the Site.

2 (6) Prepare and submit a task-specific work
3 plan, including the results of the
4 characterization study and an
5 implementation schedule, for
6 neutralizing the surface acid spill
7 between the fertilizer and fumigant tank
8 groups.

9 (7) Prepare and submit a task-specific work
10 plan, including an implementation
11 schedule, defining measures to control
12 stormwater run-on and runoff.

13 (8) Prepare and submit a task-specific work
14 plan, including an implementation
15 schedule, for the repair of the existing
16 rainwater collection, storage, and
17 treatment systems.

18 (9) Prepare and submit a task-specific work
19 plan, including an implementation
20 schedule, for the installation of a new
21 water main in a location unaffected by
22 Site contamination. If, on or before
23 the due date for the task-specific work
24 plan, Respondent has entered into an
25 agreement with the City of Shafter under
26 which Respondent will pay the City of
27 Shafter to install a new water main,
28 then the task-specific work plan need

1 not include the installation of the new
2 main, and shall instead describe a plan
3 to seal off the existing water main at
4 Shafter Well No. 10 pending the City's
5 installation of a new main.

6 d. Respondent shall implement the stationary
7 tank residue treatment and removal task-specific work plan, the
8 process pipeline and sump residue treatment and removal task-
9 specific work plan, the sewer abandonment task-specific work
10 plan, the pesticide-contaminated surface soil removal task-
11 specific work plan, the surface acid spill neutralization task-
12 specific work plan, stormwater run-on/runoff control task-
13 specific work plan, the rainwater collection, storage and
14 treatment system repair task-specific work plan, and the new
15 water main installation task-specific work plan as approved by
16 U.S. EPA in accordance with the schedules approved by U.S. EPA.
17 Failure of Respondent to implement any aspect of these task-
18 specific work plans in accordance with the approved time
19 schedules shall be deemed a violation of the terms of this Order.

20 e. Respondents shall inform EPA at least forty-
21 eight (48) hours prior to initiation of the on-site actions or
22 activities pursuant to this Administrative Order on Consent. If
23 Respondent's schedule for implementation of actions or activities
24 pursuant to this Administrative Order on Consent is modified,
25 then Respondent shall inform EPA at least forty-eight (48) hours
26 prior to the commencement of activities under the revised
27 schedule.

28 6. All materials removed from the Brown & Bryant

1 Shafter Site shall be disposed of or treated at a facility
2 approved by the On-Scene Coordinator and in accordance with the
3 Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.
4 Section 6921, et seq., as amended, the regulations promulgated
5 under that Act, Section 121(d)(3) of CERCLA, 42 U.S.C. Section
6 9621(d)(3), and the U.S. EPA Revised Off-Site Policy. In
7 carrying out the terms of this order, Respondent shall comply
8 with all applicable Federal, State, and local requirements,
9 including, but not limited to, the NCP, 40 CFR Part 300.

10 7. On or before the effective date of this Order, the
11 Respondent shall designate a Project Coordinator. To the
12 greatest extent possible, the Project Coordinator shall be
13 present on Site or readily available during Site work. The U.S.
14 EPA has designated Daniel M. Shane as its On-Scene Coordinator.
15 The On-Scene Coordinator and the Project Coordinator shall be
16 responsible for overseeing the implementation of this Order. To
17 the maximum extent possible, communication between the
18 Respondents and the U.S. EPA, and all documents, reports, and
19 approvals, and all other correspondence concerning the activities
20 relevant to this Order, shall be directed through the On-Scene
21 Coordinator and the Project Coordinator. For correspondence (not
22 including reports and other documents) from EPA to Respondent's
23 Project Coordinator, EPA shall also send copies to Respondent.
24 During the implementation of the Work Plan, the OSC and the
25 Project Coordinator shall, whenever possible, operate by
26 consensus, and shall attempt in good faith to resolve disputes
27 informally through discussion of the issues.

28 B. The U.S. EPA and the Respondent shall each have the

1 right to change their respective designated On-Scene Coordinator
2 or Project Coordinator. U.S. EPA shall notify the Respondent,
3 and Respondent shall notify U.S. EPA, as early as possible before
4 such a change is made, but in no case less than 24 hours before
5 such a change. Notification may initially be verbal, but shall
6 be reduced to writing within 48 hours after oral notification.

7 C. The U.S. EPA On-Scene Coordinator shall have the
8 authority vested in an On-Scene Coordinator by the NCP, 40 CFR
9 Part 300, as amended, including the authority to halt, conduct,
10 or direct any work required by this Order, or to direct any other
11 response action undertaken by U.S. EPA or the Respondent pursuant
12 to this Order at the facility.

13 D. No extensions to the above time frames shall be granted
14 without sufficient cause. All extensions must be requested, in
15 writing, and shall not be deemed accepted unless approved, in
16 writing, by U.S. EPA.

17 E. All instructions by the U.S. EPA On-Scene Coordinator
18 or his designated alternate, who shall be an EPA employee, shall
19 be binding upon the Respondent as long as those instructions are
20 within the scope of this Consent Order and are not clearly
21 inconsistent with the National Contingency Plan.

22 F. To the extent that the Facility or other areas where
23 work under this Order is to be performed is owned by, or in
24 possession of, someone other than the Respondent, and to the
25 extent that U.S. EPA has not already obtained access agreements
26 under which Respondent may perform response activities,
27 Respondent shall obtain all necessary access agreements. In the
28 event that after using its best efforts Respondent is unable to

1 obtain such agreements, Respondent shall immediately notify U.S.
2 EPA and U.S. EPA may then assist Respondent in gaining access, to
3 the extent necessary to effectuate the response activities
4 described herein, using such means as it deems appropriate.
5 Subject to the provisions of paragraph K of this section,
6 Respondent shall reimburse U.S. EPA for all attorneys' fees and
7 court costs it incurs in assisting Respondent to obtain access.

8 G. Respondent shall provide access to the Facility to U.S.
9 EPA employees, and U.S. EPA-authorized contractors, agents, and
10 consultants at reasonable times, and shall permit such persons to
11 be present and move freely in the area in order to conduct
12 inspections, including taking photographs and videotapes of the
13 Facility, to do cleanup/stabilization work, to take samples to
14 monitor the work under this Order, and to conduct other
15 activities which the U.S. EPA determines to be necessary.

16 H. The provisions of this Order and the directions of the
17 On-Scene Coordinator made under the provisions of this Order
18 shall be binding on the employees, agents, contractors,
19 successors, and assigns of the Respondent.

20 I. Respondent shall provide written weekly summary reports
21 to the On-Scene Coordinator regarding the actions and activities
22 undertaken under this Order. At a minimum, these reports shall
23 describe the actions that have been taken to comply with this
24 Order, including all results of sampling and tests received or
25 prepared by the Respondent and shall describe all significant
26 work items planned for the next week.

27 J. Respondent agrees to retain for six years following
28 completion of the activities required by this Order copies of all

1 records and files relating to hazardous substances found on the
2 Site, or related to the activities undertaken pursuant to this
3 Order, whether or not those documents were created pursuant to
4 this Order. Respondent shall acquire and retain copies of all
5 documents relating to the Site that are in the possession of its
6 contractors, agents and employees. Respondent shall notify U.S.
7 EPA at least sixty (60) days before any documents retained under
8 this paragraph are to be destroyed. The documents retained under
9 this paragraph shall be made available to the U.S. EPA upon
10 request.

11 K. Respondent shall pay past costs incurred by the United
12 States related to the Brown & Bryant Shafter Site, not to exceed
13 the sum of \$50,000. In addition, Respondent shall pay costs
14 incurred by the United States in the oversight of this order
15 ("oversight costs"), not to exceed the sum of \$50,000. The
16 United States expressly reserves the right to recover past costs
17 and oversight costs in excess of these amounts from Respondent.
18 After the effective date of this Order, the United States shall
19 submit a copy of the EPA Cost Documentation Management System
20 (CDMS) accounting of its past costs to Respondent. Thereafter,
21 the United States shall periodically, but not more frequently
22 than quarterly, submit a CDMS accounting of its oversight costs
23 to Respondent. Payments shall be made by Respondent within 60
24 days of Respondent's receipt of the cost statement. Payments
25 shall be made payable to the "EPA Hazardous Substances Superfund"
26 at the following address: EPA - Region 9, Attn: Superfund
27 Accounting, P.O. Box 360863M, Pittsburgh, PA 15251, in the form
28 of a certified or cashiers check. The face of the check should

1 note that the payment is for the Brown & Bryant Shafter Site,
2 Superfund Site Identification Number #09 1F. A copy of the
3 check(s) submitted must be sent simultaneously to the U.S. EPA
4 representative indicated in Paragraph V.L. below.

5 L. A notice, document, information, report, plan,
6 approval, disapproval or other correspondence required to be
7 submitted from one party to another under the Order shall be
8 deemed submitted either when hand delivered or as of the date of
9 receipt by certified mail, return receipt requested.

10 Submissions to the Respondent shall be submitted to:

11 **Dave Clark**
12 Atchison, Topeka & Santa Fe Railway Co.
13 Director, Operation Support
920 S.E. Quincy Street
Topeka, Kansas 66612

14 Submissions to the U.S. EPA shall be submitted to:

15 **Daniel M. Shane (H-8-3)**
16 On Scene Coordinator
U.S. Environmental Protection Agency
17 75 Hawthorne St.
San Francisco, CA 94105

18 M. If any provision of this Order is determined by a court
19 of competent jurisdiction to be invalid or unenforceable, the
20 balance of this Order shall remain in full force and effect.

21 N. This Order shall be effective on the date of signature
22 by the Director, Hazardous Waste Management Division.

23 **VI. STIPULATED PENALTIES**

24 A. Except as excused by any extensions of time granted by
25 EPA in writing, and subject to the provisions of this Consent
26 Order, for each day the Respondent fails to meet the deadlines
27 set forth in the Consent Order, the Work Plan, and the task-
28 specific work plans, or otherwise fails to meet the requirements

1 of this Administrative Order on Consent, Respondent agrees to pay
2 the sum set forth below as a stipulated penalty.

3 1. If the Work Plan, or any task-specific work plans
4 submitted pursuant to Paragraph V, or the Final Report submitted
5 pursuant to Paragraph VIII, is timely submitted but is determined
6 by EPA to be inadequate or to not comply with requirements of the
7 Order, EPA shall indicate to Respondent the nature of the
8 inadequacy or noncompliance and the resubmittal date for the
9 documents, not to be less than seven (7) calendar days thereafter
10 unless a shorter time is agreed to by the parties. If the
11 revised document is not resubmitted by the specified resubmittal
12 date, or if the revised document is again determined by EPA to be
13 inadequate or not in compliance with the requirements of this
14 Order, stipulated penalties shall accrue in the amount of \$1,000
15 per day of violation for the first seven days after the
16 resubmittal deadline, \$2,000 per day of violation for the 8th day
17 through the 15th day after the resubmittal deadline, \$5,000 per
18 day of violation for the 16th day through the 30th day after the
19 resubmittal deadline, and \$12,500 per day of violation for each
20 day thereafter.

21 2. For all other requirements of the Order (including
22 the failure to timely submit the Work Plan, any task-specific
23 work plan, or the Final Report, and the failure to meet any
24 deadline established in the Consent Order, Work Plan, or task-
25 specific work plans), stipulated penalties shall accrue in the
26 amount of \$1,000 per day of violation for the first seven days,
27 \$2,000 per day of violation for the 8th day through the 15th day,
28 \$5,000 per day of violation for the 16th day through the 30th

1 day, and \$12,500 per day of violation for each day thereafter.

2 B. All penalties which accrue pursuant to the requirements
3 of this Order shall be paid within thirty (30) calendar days of
4 written demand by U.S. EPA. Payment shall be made to the EPA
5 Hazardous Substances Superfund at: EPA - Region 9, Attn:
6 Superfund Accounting, P.O. Box 360863M, Pittsburgh, PA 15251,
7 payable in the form of a certified or cashier's check payable to
8 "EPA Hazardous Substances Superfund." The face of the check
9 should note that the payment is for the Brown & Bryant Shafter
10 Site, Superfund Site Identification Number 09 1F.

11 C. Pursuant to 31 U.S.C. Section 3717, interest shall
12 accrue on any amount of overdue stipulated penalties at a rate
13 established by the United States Treasury. Stipulated penalties
14 shall accrue, but need not be paid, during any dispute resolution
15 period concerning the particular penalties at issue. If
16 Respondent prevails upon resolution, Respondent shall pay only
17 such penalties as the resolution requires.

18 D. Payment of stipulated penalties will not relieve
19 Respondent from complying with the terms of this Consent Order.
20 U.S. EPA retains the right to seek any remedies or sanctions
21 available to U.S. EPA by reason of Respondent's noncompliance
22 with the provisions of this Consent Order that are not otherwise
23 expressly limited by these Stipulated Penalty provisions.

24 VII. PENALTIES FOR NONCOMPLIANCE

25 Respondent is advised pursuant to Section 106(b) of CERCLA,
26 42 U.S.C. Section 9606(b), that violation or subsequent failure
27 or refusal to comply with this Order and any Work Plan approved
28 under this Order, or any portion thereof, may subject the

1 Respondent to a civil penalty of no more than \$25,000 per day for
2 each day in which such violation occurs, or such failure to
3 comply continues. In addition, failure to properly provide
4 removal action upon the terms of this order, or other subsequent
5 orders issued by U.S. EPA, may result in liability for punitive
6 damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C Section
7 9607(c)(3).

8 VIII. TERMINATION AND SATISFACTION

9 A. Within thirty (30) days following completion of the
10 work required under this Order, or within such time as may be
11 designated by EPA in an approved work plan, the Respondent shall
12 submit a Final Report summarizing the actions taken to comply
13 with this Order. The report shall contain, at a minimum:
14 identification of the Facility, a description of the locations
15 and types of hazardous substances encountered at the Facility, a
16 chronology and description of the actions performed (including
17 both the organization and implementation of response activities),
18 a listing of the resources committed to perform the work under
19 this Order (including financial, personnel, mechanical and
20 technological resources), identification of all items that
21 affected the actions performed under the Order and discussion of
22 how all problems were resolved, a listing of quantities and types
23 of materials removed, a discussion of removal and disposal
24 options considered for those materials, a listing of the ultimate
25 destination of those materials, and a presentation of the
26 analytical results of all sampling and analyses performed and
27 accompanying appendices containing all relevant paperwork accrued
28 during the action (e.g., manifests, invoices, bills, contracts,

1 permits). The Final Report shall also include a declaration from
2 a person who supervised or directed the preparation of that
3 report. The declaration shall certify under penalty of perjury
4 that based on personal knowledge and appropriate inquiries of all
5 other persons involved in preparation of the report, the
6 information submitted is true, accurate and complete to the best
7 of the declarant's knowledge and belief.

8 B. The provisions of this Order shall be deemed satisfied
9 upon payment by Respondent of all sums due under the terms of
10 this Order and upon the Respondent's receipt of written notice
11 from U.S. EPA that the Respondent has demonstrated, to the
12 satisfaction of U.S. EPA, that all of the terms of this Order,
13 including any additional tasks consistent with this Consent Order
14 which U.S. EPA has determined to be necessary, have been
15 completed.

16 IX. INDEMNIFICATION

17 The Respondent agrees to indemnify and save and hold
18 harmless the United States Government, its agencies, department,
19 agents, and employees, from any and all claims or causes of
20 action arising from, or on account of, acts or omissions of the
21 Respondent, its officers, employees, receivers, trustees, agents,
22 successors or assigns, in carrying out the activities pursuant to
23 this Order. The United States Government shall not be held as a
24 party to any contract entered into by the Respondent in carrying
25 out activities under this Order.

26 X. RESERVATION OF RIGHTS

27 A. EPA reserves the right to bring an action against the
28 Respondent under Section 107 of CERCLA for recovery of all

1 response costs, including past costs and oversight costs,
2 incurred by the United States at the Site that are not reimbursed
3 by the Respondent, any costs incurred in the event that EPA
4 performs the work required under this Order or any part thereof,
5 and any future costs incurred by the United States in connection
6 with response activities conducted under CERCLA at the Site.

7 B. EPA reserves the right to bring an action against
8 Respondent to enforce the past costs and response and oversight
9 cost reimbursement requirements of this Consent Order, to collect
10 stipulated penalties assessed pursuant to Section VI of this
11 Consent Order, and to seek penalties pursuant to Section 109 of
12 CERCLA, 42 U.S.C. Section 9609.

13 C. Except as expressly provided in this Order, each party
14 reserves all rights and defenses it may have. Nothing in this
15 Consent Order shall affect EPA's removal authority or EPA's
16 response or enforcement authorities including, but not limited
17 to, the right to seek injunctive relief, stipulated penalties,
18 statutory penalties, and/or punitive damages.

19 D. Following satisfaction of the requirements of this
20 Consent Order, Respondent shall have resolved its liability to
21 EPA for the work performed by Respondent pursuant to this Consent
22 Order. Respondent is not released from liability, if any, for
23 any response actions taken beyond the scope of this Order
24 regarding removals, remedial design/remedial action, or
25 activities arising pursuant to Section 121(c) of CERCLA.

26 E. Nothing in this Order shall confer upon Respondents any
27 ability to obtain pre-enforcement review of U.S. EPA actions.
28 Notwithstanding any reservation of rights, Respondent agrees to

1 comply with the terms and conditions of this Order and consents
2 to the jurisdiction of the U.S. EPA to enter into and enforce
3 this Order.

4 F. Nothing herein shall be construed to prevent U.S. EPA
5 from exercising its right to disapprove of work performed by the
6 Respondent.

7 **XI. FORCE MAJEURE**

8 A. The Respondent shall cause all work to be performed
9 within the time limits set forth herein and in the approved Work
10 Plan and task-specific work plans, unless EPA determines that
11 performance is delayed by "force majeure". For purposes of this
12 Order, "force majeure" shall mean an event arising from causes
13 entirely beyond the control of the Respondent and their
14 contractors which delays or prevents the performance of any
15 obligation required by this Order. Increases in costs, financial
16 difficulty, and normal inclement weather are examples of events
17 that are not considered to be beyond the control of the
18 Respondent.

19 B. Respondent shall notify the OSC within 24 hours after
20 Respondent becomes aware of any event which Respondent contends
21 constitutes a force majeure, with subsequent written notice
22 within seven (7) calendar days of the event. Such written notice
23 shall describe: 1) the nature of the delay, 2) the cause of the
24 delay, 3) the expected duration of the delay, including any
25 demobilization and remobilization resulting from the delay, 4)
26 the actions which will be taken to prevent or mitigate further
27 delay, and 5) the timetable by which the actions to mitigate the
28 delay will be taken. Respondent shall implement all reasonable

1 measures to avoid and/or minimize such delays. Failure to comply
2 with the notice provision of this paragraph shall be grounds for
3 U.S. EPA to deny Respondent an extension of time for performance.
4 The Respondent shall have the burden of demonstrating by a
5 preponderance of the evidence that the event is a force majeure,
6 that the delay is warranted under the circumstances, and that
7 best efforts were exercised to avoid and mitigate the effects of
8 the delay. If U.S. EPA determines a delay is or was attributable
9 to a force majeure, the time period for performance under this
10 Order shall be extended as deemed necessary by EPA to allow
11 performance.

12 XII. DISPUTE RESOLUTION

13 A. The Parties to this Order on Consent shall attempt to
14 resolve expeditiously and informally any disagreements concerning
15 implementation of this Order on Consent or any Work required
16 hereunder.

17 B. In the event that any dispute arising under this Order
18 on Consent is not resolved expeditiously through informal means,
19 any party desiring dispute resolution under this Section shall
20 give prompt written notice to the other party(ies) to the Order.

21 C. Within ten (10) days of the service of notice of
22 dispute pursuant to Paragraph XII.B above, the party who gave
23 notice shall serve on the other parties to this Order a written
24 statement of the issues in dispute, the relevant facts upon which
25 the dispute is based, any factual data, analysis or opinion
26 supporting its position, and all supporting documentation on
27 which such party relies (hereinafter the "Statement of
28 Position"). The opposing parties shall serve their Statement of

1 Position, including supporting documentation, no later than ten
2 (10) days after receipt of the complaining party's Statement of
3 Position. These 10-day time periods for exchange of Statements
4 of Position may be shortened or lengthened upon notice by U.S.
5 EPA, if deemed appropriate by U.S. EPA in light of the nature of
6 the dispute.

7 D. The administrative record of any dispute under this
8 Section shall be maintained by U.S. EPA. The record shall
9 include the written notification of such dispute, and the
10 Statements of Position served pursuant to the preceding
11 paragraphs.

12 E. Upon review of the administrative record, the Director
13 of the Hazardous Waste Management Division, U.S. EPA, Region IX,
14 shall resolve the dispute. Respondent shall proceed in
15 accordance with the decision of the Director of the Hazardous
16 Waste Management Division.

17 F. Respondent is not relieved of its obligations to make
18 payments, perform and conduct activities, and submit deliverables
19 on the schedules set forth herein and in the work plans, while a
20 matter is pending in dispute resolution.

21 G. Respondent agrees to limit any disputes concerning
22 costs to accounting errors and the inclusion of oversight costs
23 outside the scope of this Consent Order. Respondent shall
24 identify any contested costs and the basis of its objection. All
25 undisputed costs shall be remitted by Respondent in accordance
26 with the provisions of paragraph V.K above. Disputed costs shall
27 be paid by Respondent into an escrow account while the dispute is
28 pending. Respondent bears the burden of establishing an EPA

1 accounting error or the inclusion of oversight costs outside the
2 scope of this Consent Order.

3 **XIII. NON-ADMISSION**

4 The consent of the Respondent to the terms of this Order
5 shall not constitute or be construed as an admission of liability
6 or of U.S. EPA's findings or determinations contained in this
7 Order in any proceeding other than a proceeding to enforce the
8 terms of this Order.

9 **XIV. CERCLA FUNDING**

10 A. The Respondent waives any claims or demands for
11 compensation or payment under Sections 106(b), 111 and 112 of
12 CERCLA against the United States or the Hazardous Substance
13 Response Trust Fund for, or arising out of, any activity
14 performed or expenses incurred pursuant to this Consent Order.

15 B. This Consent Order does not constitute any decision on
16 preauthorization of funds under Section 111(a)(2) of CERCLA.

17 **XV. SUBSEQUENT AMENDMENT**

18 This Consent Order may be amended by mutual agreement of
19 U.S. EPA and the Respondent. Any amendment of this Consent Order
20 shall be in writing, signed by U.S. EPA and the Respondent and
21 shall have as the effective date, that date on which such
22 amendment is signed by U.S. EPA.

23 **XVI. SIGNATORIES**

24 Each undersigned representative of a signatory to this
25 Administrative Order on Consent certifies that he or she is fully
26 authorized to enter into the terms and conditions of this Order
27 and to bind such signatory, its directors, officers, employees,
28 agents, successors and assigns, to this document.

1 Agreed this 26th day of December, 1991.

2 ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

3 By ONECHK /for Mark Stehly

4 Name Mark Stehly

5 Title Director Operations Support

6

7

8 The above being agreed and consented to, it is so ORDERED

9 this 17th day of January, ~~1991~~ 1992.

10

11 By Heim A. Takat

12 ~~for~~ JEFF ZELIKSON, Director
13 Hazardous Waste Management Division
14 U.S. Environmental Protection Agency
15 Region IX

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16 Contacts:

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BROWN AND BRYANT SHAFTER FACILITY

